

# THE ENGLISH LAW APPROACH TO ARBITRABILITY OF DISPUTES

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The arbitrability of disputes under English law was not given a statutory character by the Arbitration Act 1996. The Arbitration Act 1996 contains provisions that could address the topic indirectly, however, it is not clear how and if arbitrability could be found within the Act as the approach is rather tangential. It was left for the case law to define arbitrability and regulate its application but in relation to its definition, the approach has not been successful. Albeit this scenario, it does not mean that there is no arbitrability of disputes under English law, on the contrary, several cases have been deciding issues of arbitrability. Therefore, this article analyses the arbitrability of disputes in English law through the lens of the Arbitration Act 1996 and the case law regarding specific subjects in which the issue has been raised. The study demonstrates that there is a confusion regarding the definition of arbitrability and argues that its application under English law needs clarification.

Arbitrability of disputes is not a new topic – in fact, there is an exhaustive discussion about the subject.<sup>1</sup> Nevertheless, under English law, the subject is confusing as arbitrability of disputes was not given a statutory character by the Arbitration Act 1996 (AA) and the case law has not been helpful in defining it.<sup>2</sup> Arbitrability, following the wording of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC), means that the parties to the agreement were under some incapacity according to the law applicable to them,<sup>3</sup> and also that “the subject matter

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<sup>1</sup> See for instance L Mistelis and S Brekoulakis, *Arbitrability, International & Comparative Perspectives* (Wolters Kluwer Law & Business, 2009), B Hanotiau, ‘The Law Applicable to Arbitrability’, in A J Van Den Berg (ed), *Improving the Efficiency of Arbitration and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series, 1998 Paris Volume 9 (Kluwer Law International 1999), P Bernardini, ‘The Problem of Arbitrability in General’, in E Gailard and D Di Pietro (ed), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (England, Cameron May, Ltd, 2008), A S Rau, ‘The Arbitrability Question Itself’ (1999) 10, *Am.Rev.Intl. Arb.*, 287, A I Okekeifere, ‘Public Policy and arbitrability under the UNCITRAL Model Law’ (1999) 2 (2), *Int.A.L.R.*, 70, A Kirry, ‘Arbitrability, Current Trends in Europe’ (1996) 12, 4, *Arbitration Int.*, 373, C E Faro and F Guimarey, ‘Who Should Determine Arbitrability? Arbitration in a Changing Economic and Political Environment’ [1996] 12, 4, *Arbitration Int.*, 415, H Arfazadeh, ‘Arbitrability under the New York Convention: the Lex Fori Revisited’ [2001] 17, 1, *Arbitration Int.*, 73, J Paulsson, ‘Arbitrability, Still Through a Glass Darkly, in Arbitration in the Next Decade’ (ICC Bulletin, Special Supplement 1999) 95 and E Schwartz, ‘The Domain of Arbitration and Issues of Arbitrability: The View from the ICC’ [1994] *ICSID Review—Foreign Investment Law Journal*, 17.

<sup>2</sup> Such scenario is not atypical as the concept of arbitrability is not written in stone, for instance the German approach in which Section 1029 of the German Code of Civil Procedure states that any dispute that has an economic interest can be arbitrated whilst the Dutch Code of Civil Procedure, Article 1020, 3 and the Spanish Arbitration Act 2003, Article 2(1), refer to arbitrability as disputes of matter that parties can freely dispose.

<sup>3</sup> Article V 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

of the difference is not capable of settlement by arbitration”.<sup>4</sup> In the literature concerning international commercial arbitration, it “involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts.”<sup>5</sup> But the concept goes beyond that as in the United States of America (USA), when it comes to arbitrability, the examination is of “the question of who should decide whether the parties agreed to arbitrate the merits of the dispute.”<sup>6</sup> The arbitral tribunal “can decide whether a dispute can be arbitrated”<sup>7</sup> and also whether the parties agreed to have that specific question arbitrated. In other words, it means the parties consented to have a specific type of dispute solved by arbitration in their arbitration agreement. Therefore, courts, when analysing the issue of arbitrability, will see the topic as a jurisdictional matter scrutinizing the validity of the arbitration agreement before seeing if the subject matter in itself is capable of settlement by arbitration.

In addition, arbitrability and public policy tends to overlap. As public policy represents the fundamental principles of a certain jurisdiction, on a linear assessment some issues considered as matters of public policy cannot be the subject of arbitration and therefore are non-arbitrable. For instance, punishing someone for committing a crime belongs to the exclusive jurisdiction of a state court, thus it cannot be the subject to the privatization of justice, and hence it is unable to be the subject to arbitration. However, many issues considered nowadays as part of public policy have been approached in a flexible way and no longer are excluded from arbitration.<sup>8</sup> Nevertheless,

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<sup>4</sup> Article V, II (a): Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country.

<sup>5</sup> N Blackaby, C Partasides, A Redfern and M Hunter, *Redfern and Hunter on International Arbitration*, (Oxford University Press 2009) 122.

<sup>6</sup> L Shore, ‘US Perspective on Arbitrability’, in Mistelis, (n1) 72.

<sup>7</sup> M St Germain, ‘The Arbitrability of Arbitrability’ [2005] Vol. 2, J.Disp.Resol., 523, 524

<sup>8</sup> See K Böckstiegel, ‘Public Policy and Arbitrability’ in P Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series, 1986 New York Volume 3* (Kluwer Law International 1987), B Hanotiau and O Caprasse, ‘Public Policy in International Commercial Arbitration’, in E Gailard & D Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (England, Cameron May, Ltd, 2008), J Paulsson, ‘El orden público como criterio para negar el reconocimiento y la ejecución de laudos arbitrales’, in Guido S. Tawil and Eduardo Zuleta (Directores) *El Arbitraje Comercial Internacional, Estudio de La Convención de Nueva York con motivo de su 50º aniversario* (Abeledo Perrot, 2008), J MD Lew, ‘Competition Laws: Limits to Arbitrator’s Authority’, in L Mistelis & S Brekoulakis (eds), *Arbitrability, International and Comparative Perspective* (Netherlands, Wolters Kluwer, 2009), D Di Pietro, ‘Arbitrability Under the New York Convention’, in L Mistelis & S Brekoulakis (editors) *Arbitrability, International & Comparative Perspectives*

public policy still constitutes a defence against enforcement and arbitrability has been used as a reason to avoid recognition on grounds of public policy.

The English scenario seems to have adopted features from all concepts mentioned above, leaving doubt if arbitrability includes only matters of jurisdiction or also subject matters of the dispute. The AA contains provisions that could address the topic indirectly, especially when it comes to jurisdictional challenges and public policy; however, it is not clear how and if arbitrability could be found within the Act as the approach is oblique. Thus, the purpose of this article is to analyse the issue of arbitrability of disputes in English law to assess if the absence of a definition by the AA and a confusing concept in the case law is functional.

## **I. Arbitrability and the Arbitration Act 1996**

Notwithstanding that the AA does not expressly regulate arbitrability, when examining some of the Act's provisions, it is possible to understand the indirect approach to what matters are capable of settlement by arbitration. Section 81(1)(a) of the act adopts the view of the NYC when it says that "[n]othing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to – (a) matters which are not capable of settlement by arbitration." As the wording of the provision explains, in matters not capable of settlement by arbitration nothing can exclude the rule of law of this part, which refers to English law. This leads to the conclusion that the applicable law to decide arbitrability during the referral stage of an arbitration is English law.<sup>9</sup> The provision preserves matters governed by common law and that do not make part of the Act. Since the Act is a consolidation of the

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(Netherlands, Kluwer Law International, 2009) and S Brekoulakis, 'Arbitrability – Persisting Misconceptions & New Areas of Concern', in L Mistelis & S Brekoulakis (eds), *Arbitrability, International & Comparative Perspectives* (Netherlands, Wolters Kluwer Law & Business, 2009)

<sup>9</sup> J DM Lew and O Mardsen, 'Arbitrability', in J D M Lew, H Bor, G Fullelove and J Greenaway (ed), *Arbitration in England with chapters on Scotland and Ireland* (Kluwer Law International, 2013) 402 and M. Danov, 'The Law governing arbitrability under the Arbitration Act 1996' (2008) L.M.C.L.Q., 536, 543-542.

previous case law, the three situations in Section 81(1) are matters “where the common law rules are still in force.”<sup>10</sup> This section reinforces the idea that arbitrability in England is a subject of common law and it does not require a codification of issues that are non-arbitrable. The section goes further and in letter (c) it adds the refusal of recognition of awards on grounds of public policy.

Observing the impact of arbitrability on awards and the possibility of a challenge to it, Section 68(2)(g) denotes that an award can be challenged on the grounds of serious irregularity when it is contrary to public policy. Here, the AA is not addressing the issue of arbitrability specifically, but touches on its public policy aspect. In addition, Section 103(3)<sup>11</sup> which is actually an incorporation of article V, II(a) and (b) of the NYC talks about matters capable of settlement by arbitration and the public policy impediment to recognition and enforcement of arbitral awards. Article V, II(b) of the NYC does not specify which public policy it refers to, it declares that a court seized with a request for recognition will refuse it if it finds the award to be against the “public policy of that country.” The article is not clear if this public policy should be domestic or international. Despite the wording of the article, it has been argued that the reference should be to the international as opposed to the domestic.<sup>12</sup> Additionally, some jurisdictions have implied that if a contract is international, the scrutiny has to be under international public policy.<sup>13</sup> The same question was raised in relation to English law. In *IPCO (Nigeria) Limited v. Nigerian National*

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<sup>10</sup> Lord Mustill and S. C Boyd, *Commercial Arbitration, 2001 Companion Volume*, 2<sup>nd</sup> Edition (London: Butterworths, 2001) 371.

<sup>11</sup> Section 103. – Refusal of recognition or enforcement ... (3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

<sup>12</sup> A J Van der Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, 1981) 361; T L. Harris, ‘The “Public Policy” Exemption to Enforcement of International Arbitration Awards Under the New York Convention’ [2007] Volume 24, 1, J.Int’l Arb., 9, 11-12; and D Otto and O Elwan, ‘Article V(2)’, in H Kronke, P Nacimiento, D Otto and N C Port (eds) *Recognition and Enforcement of Foreign Arbitral Awards, a Global Commentary on the New York Convention* (Kluwer Law International, 2010) 366-367

<sup>13</sup> See the decision in Luxembourg from the *Cour Supérieure de Justice* in *Kersa Holding Company Luxembourg v. Infancourtage et al.* [1996] YBCA, volume XXI, 617, Cour Supérieure de Justice, November 24, 1993 and in Canada by the Cour d’Appel Quebec in *Smart Systems Technologies Inc v. Domotique Secant Inc.* [2008] YBCA, volume XXXIII, 464, Cour d’Appel Quebec, March 11, 2008, no. 500-09-016097-057. Moreover see Article 1514, of the French Code of Civil Procedure and Article 46(b) of the Paraguayan Arbitration Act 2002.

*Petroleum Corporation*,<sup>14</sup> challenge based on public policy violation under the NYC was made by the fact that the defendant, Nigerian National Petroleum Corporation (NNPC), is a state-owned company and the Act that created this corporation established that the company's assets could not be attached by court execution.<sup>15</sup> Since the enforcement of the award could lead to an attachment of its assets, NNPC argued that there was a violation of public policy. Justice Gross asserted that "[t]he reference to public policy in s.103(3) was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards. Instead, the public policy exception in s.103(3) is confined to the public policy of England (as the country in which enforcement is sought)."<sup>16</sup> The same occurred in *Minmetals Germany GmbH v. Ferco Steel Ltd*<sup>17</sup> in which an award issued by the China International Economic and Trade Arbitration Commission, brought to be enforced in England, was challenged on public policy grounds. The court reaffirmed the position established in *IPCO* and it stated five considerations when assessing English public policy as a barrier to enforcement. They are:

"(1) the nature of the procedural injustice; (2) whether the enforcer has invoked the supervisory jurisdiction of the seat of the arbitration; (3) whether a remedy was available under that jurisdiction; (4) whether the courts of that jurisdiction have conclusively determined the enforcer's complaint in favour of upholding the award; and (5) if the enforcer has failed to invoke that remedial jurisdiction, for what reason and in particular whether he was acting unreasonably in failing to do so."<sup>18</sup>

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<sup>14</sup> [2005] EWHC 726 (Comm).

<sup>15</sup> Section 14 of the NNPC Act declares: In any action or suit against the Corporation no execution or attachment or process in the nature thereof shall be issued against the Corporation but any sums of money which may, by the judgment of the court, be awarded against the Corporation shall, subject to any directions given by the court where notice of appeal has been given by the Corporation, be paid from the general reserve fund of the Corporation.

<sup>16</sup> *IPCO (Nigeria) Limited v. Nigerian National Petroleum Corporation*, [2005] EWHC 726 (Comm), paragraph 13.

<sup>17</sup> [1999] C.L.C. 647.

<sup>18</sup> Ibid 662. The same line of thought can be found in *Nomihold Securites Inc v. Mobile Telesystems Finance SA* [2011] EWHC 2143 (Comm), paragraphs 55, 62 and 66 and *Soleimany v. Soleimany* [1999] Q.B. 785 at 799.

The case law can only assist in the sense that a challenge on arbitrability embodied by the public policy obstacle has to be examined under English public policy.

Within the AA's structure, it is clear that the arbitrability of a dispute can be argued when the award has been issued. This is done when it relates to a matter of public policy and also under the auspices of the NYC. During the referral stage there is no specific provision concerning arbitrability and a challenge on such grounds would have to be as a question of substantive jurisdiction of the tribunal,<sup>19</sup> based on the terms of Section 30<sup>20</sup> and 82(1).<sup>21</sup> Substantive jurisdiction is defined in Section 82(1) as the matters specified in Section 30(1)(a) to (c) which are the provisions regulating the capacity of the tribunal to rule on its own jurisdiction in issues of the validity of the arbitration agreement, the tribunal's constitution and what matters have been submitted to arbitration in accordance with the arbitration agreement.

## **II – The Dallah case and the definition of arbitrability**

When the AA addresses the validity of the arbitration agreement, it can arguably be said that it also covers matters that can be referred to arbitration,<sup>22</sup> including issues of arbitrability of disputes. If that is the case, the English approach could be closer to the USA view of arbitrability, namely, it being a matter of jurisdiction.<sup>23</sup> The USA perspective is unique as it considers how far the parties wanted the arbitration agreement to reach, namely, the scope of the arbitration

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<sup>19</sup>Lew (n9) 401.

<sup>20</sup> Section 30 Competence of tribunal to rule on its own jurisdiction. (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to— (1) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

<sup>21</sup> Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

<sup>22</sup> Section 82 Minor definitions. In this Part— ... “substantive jurisdiction”, in relation to an arbitral tribunal, refers to the matters specified in section 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.

<sup>23</sup> R Merkin, *Arbitration Law* (London: LLP, 2004) 319.

<sup>24</sup> For the USA perspective, see N Wyss, ‘First Options of Chicago, Inc v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz’ [1997] Vol. 72, Tul.L.Rev., 351, S H Reisberg, ‘The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited’ [2009] Vol. 20, Am.Rev.Int'l.Arb., 159 and W W Park, ‘The Arbitrability Dicta in First Option v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?’ [1996] Vol. 12, 2, Arb.Int'l, 137.

agreement. Despite this exception, the USA's system is not entirely inadequate. Arbitrability is, after all, a matter of jurisdiction because if a dispute is not arbitrable, the tribunal does not have jurisdiction to rule on the substantive issues of the case but it will rule on its own jurisdiction. Also, if arbitrability is a limitation imposed by law, again, the tribunal has no power to decide the grievance brought to them. Arbitrability can be a barrier to arbitration and this issue is either raised as a challenge to the tribunal's jurisdiction during the referral stage or as a challenge to the award during the enforcement stage. Although, the viewpoint might resonate similarities, under English law, during the referral stage a challenge based on lack of arbitrability confronts the arbitral tribunal's jurisdiction to rule the dispute just as it would in other jurisdictions. As a result, if the subject matter is not capable of settlement by arbitration, the arbitral tribunal has no jurisdiction to adjudicate the impasse. This would not be a discussion on the grounds that the parties agreed or not to have a specific dispute decided by arbitration; this would be a matter for the scope of the arbitration agreement. Alternatively, being a question of substantive jurisdiction, its jurisdictional aspect cannot be ignored, which is why the application of Section 30(1)(a) to arbitrability is arguable.

Nevertheless, a case of recognition and enforcement of an award ruled by the Supreme Court might have created confusion. In *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan*<sup>24</sup> an award was issued in France and brought to the United Kingdom for enforcement. The main point of the case's discussion was whether the Government of Pakistan was a part of the contract and, therefore, could be a part of the arbitration agreement. The case did not involve arbitrability issues. Yet, during the enforcement stage, based

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<sup>24</sup> [2010] UKSC 46.

on Section 103(2)(b) AA,<sup>25</sup> the Supreme Court debated the reach of the arbitration clause and examined the question of arbitrability in the same sense as it is done in the USA. The approach was not relevant and it led to a misunderstanding since the topic being challenged was not arbitrability, but the validity of the arbitration agreement in relation to the Pakistani government. During the deliberation it was raised that in the first partial award concerning the tribunal's jurisdiction there was no discussion on whether there was an agreement to submit the question of arbitrability itself to arbitration; that is, if the parties had agreed to include the government or not in the agreement. Lord Mance asserted that Dallah was not able to fulfil the conditions of Section 102(1)(b) AA which requires the demonstration of the original arbitration agreement; hence, there was no evidence that it was agreed to submit the question of arbitrability to the tribunal.<sup>26</sup> He also stated that it is possible for the parties to submit to the arbitrators the question of arbitrability, explaining "that is a question arising as to whether they had previously agreed to submit to arbitration (before a different or even the same arbitrators) a substantive issue arising between them."<sup>27</sup> He went on to quote the USA leading case on arbitrability of *First Option of Chicago v. Kaplan*<sup>28</sup> as support of his argument. The same point was raised by Lord Collins, but he explained that the question of arbitrability was to verify if the courts could examine the question of arbitrability due to the principle of competence-competence.<sup>29</sup> The view taken in Dallah is rather

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<sup>25</sup> Section 103 Refusal of recognition or enforcement ... (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves— ... (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

<sup>26</sup> Paragraph 22 of the decision declares: "At times, Dallah has put its case regarding the first partial award even higher. In her oral submissions, Miss Heilbron went so far as to suggest that the first partial award was itself an award entitled to recognition and enforcement under the New York Convention. No application for its recognition or enforcement has in fact been made (the present proceedings concern only the final award), but, quite apart from that, the suggestion carries Dallah nowhere. First, (in the absence of any agreement to submit the question of arbitrability itself to arbitration) I do not regard the New York Convention as concerned with preliminary awards on jurisdiction. As Fouchard, Gaillard, Goldman's *International Commercial Arbitration*, para 654, observes the Convention "does not cover the competence competence principle". Dallah could not satisfy even the conditions of Article IV(1) of the Convention and s.102(1)(b) of the 1996 Act requiring the production of an agreement under which the parties agreed to submit the question of arbitrability to the tribunal - let alone resist an application under Article V(1)(a) and s.103(2)(b) on the ground that the parties had never agreed to submit that question to the binding jurisdiction of the tribunal."

<sup>27</sup> (n24) paragraph 24.

<sup>28</sup> (94-560), 514 U.S. 938 (1995)

<sup>29</sup> Paragraphs 90 and 91 of the decision: "90. *First Options of Chicago Inc v Kaplan*, 514 US 938 (1995) was not an international case. It concerned the application of the Federal Arbitration Act to an award of an arbitral panel of the Philadelphia Stock Exchange. The question was whether the federal District Court should independently decide whether the arbitral panel had jurisdiction. The United States Supreme Court drew a distinction



confusing because there was no discussion of arbitrability in the sense of the dispute being capable of settlement by arbitration. There was a debate on the validity of the arbitration agreement and if the government was a party to it. This dialogue differs from the capacity or possibility of a government to be part of an arbitration agreement, which would be an adequate debate on arbitrability. The USA method follows a specific legal reasoning employed to analyse arbitrability as it involves questions of jurisdiction, as well as the subject matter being capable of settlement by arbitration. The situation is not the same in England, but the *Dallah* case gave room to the implementation of such doctrine. However, so far, the argument remains an *obiter dictum* as the object of the case was about the scope of the arbitration agreement as opposed to arbitrability.

In effect, there is no doubt that arbitrability relates to jurisdiction, but this idea of looking if the parties agreed to submit the question of arbitrability to the tribunal, in the sense that if the arbitration agreement covers a dispute or not, is a matter of formation of contracts and not if the parties gave power to the arbitrators to decide if the dispute is arbitrable. Regardless of the powers given by the parties to the arbitrators, there will always be a limitation to what they can decide. Although, if that is the case, a court can still vacate the award if it finds that the arbitrators had no power to make such a decision. An example would be if the parties said that the arbitrators can impose a fine or a penalty that can only be given by a governmental authority. Even so, in England, challenges on arbitrability will be of substantive jurisdiction and Section 103(2)(b) is not about arbitrability.

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between the case where the parties had agreed to submit the arbitrability question itself to arbitration, and the case where they had not. In the former case the court should give considerable leeway to the arbitrator, setting aside the award only in certain narrow circumstances, but (at 943, per Breyer J): “If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently”. 91. That flowed inexorably from the fact that arbitration was simply a matter of contract between the parties and was a way to resolve those disputes, but only those disputes, that the parties had agreed to submit to arbitration.”

### **III – The case law regarding particular issues of arbitrability**

Despite the AA not having a specific provision regulating arbitrability, English courts have been deciding cases in which the object of the quarrel was the capacity of private tribunal to decide certain disputes. Some cases addressed questions in which a statute requires the dispute to be submitted to a court of law but it is presented to an arbitral tribunal, being a question of jurisdiction, while other cases the issue of arbitrability is peripheral and closely connected to a public policy concern. The cases were decided before *Dallah* and they do not talk about the definition of arbitrability, they represent a series of non-exhaustive examples to give an overview of how the courts have been interpreting specific questions of arbitrability.

#### **A. Arbitrability and the State or State-Owned Companies**

The situation whereby a state or a state-owned company can make an agreement to arbitrate is a matter of arbitrability since it deals with the capacity of a party to participate in arbitral proceedings. In England this is not a controversial subject; in fact, the case law, so far, does not address it in relation to government entities or companies owned by the government. This is because Section 106 of the AA asserts that the Crown can be a party to an arbitration agreement. Thus, there is no prohibition under English law concerning the capacity of a state or a state entity to conclude an arbitration agreement or to participate in arbitration.<sup>30</sup> Moreover, the wording of the AA does not require any special authorization from the government for it or its entities to be a party in arbitration. Hence, it is unlikely that any case concerning the Crown being a party to arbitration would be challenged on the grounds of lack of arbitrability.

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<sup>30</sup> D. St. J. Sutton, J. Gill and M. Gearing, *Russell on Arbitration*, 23<sup>rd</sup> Edition (London: Sweet & Maxwell, 2007) 105-106.

Nevertheless, this does not mean that such a topic is strange to the courts. In *Gatoil v. NIOC*<sup>31</sup> the parties concluded a contract to buy crude oil. Once the contract was breached and arbitral proceedings started, it was argued that NIOC needed special authorization from the Iranian government to participate in any arbitration, and since this requirement had not been fulfilled, the condition rendered the arbitration agreement inoperative or incapable of being performed. Bingham LJ came to the conclusion that if the authorization was necessary, Gatoil could not seek the invalidity of the arbitration agreement if it did not procure the permission. He added that if it was for NIOC to seek authorization, the question of why it would pursue such authorization if it did not start any arbitral procedure would arise; and why should they obtain permission when Gatoil clearly did not choose to arbitrate once it started court proceedings. In addition, the court asserted that a contrary view would require Gatoil to start arbitral proceedings and wait for NIOC to request the permission. At this moment, if NIOC did not request the approval, Gatoil could rely on the arbitration agreement being incapable of being performed. The arbitrability under the inoperative exception would be hard to demonstrate; yet, as an agreement incapable of being performed, there could be room for a challenge to arbitrability. In effect, this was done without mentioning the word arbitrability but seeking the same result as a declaration of non-arbitrability. In *Svenska Petroleum Exploration Ab v. Lithuania & Anor*<sup>32</sup> arbitrability was argued in a peripheral way because after the arbitration agreement was signed, the law of Lithuania changed and it was not possible to arbitrate disputes regarding underground natural resources. The main discussion in court was about the construction of the arbitration agreement and if Lithuania would enjoy state immunity in English courts. It was concluded that Lithuania was a party to the contract and, consequently, a party to the arbitration agreement. Concerning arbitrability, in a *dictum*,

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<sup>31</sup> 1990 WL 10622722.

<sup>32</sup> [2006] EWCA Civ 1529.

Moore Bick LJ addressed the issue but not in a relevant manner, he declared that “[t]he question whether disputes relating to underground natural resources are incapable of being referred to arbitration under Lithuanian law is potentially of some importance because it might provide a basis for holding that the Government could not effectively submit disputes under the Agreement to arbitration.”

It can be verified that England and Wales did not create statutory barriers for the Crown to have arbitration as a dispute resolution method. Furthermore, there are not many state-owned companies in England and the outstanding companies can have their disputes submitted to arbitration. As a result, arbitrability of disputes regarding state-owned companies would not find an obstacle under English law.

## **B. Arbitrability and insolvency**

The interaction between insolvency procedures and arbitration is not new to English legislation.<sup>33</sup> In case of personal bankruptcy, the Insolvency Act 1986 in Section 349A<sup>34</sup> determines that the trustee can decide if the arbitration agreement is enforceable and if the trustee thinks it is not, a party can apply to court to have the arbitration agreement enforced. The trustee can also, with the permission of the court, make an agreement to arbitrate after bankruptcy is declared.<sup>35</sup> If the arbitration is pending and bankruptcy is adjudged before arbitration terminates, the court can stay the proceeding but this is not a mandatory action, as the language used in the

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<sup>33</sup> The Arbitration Act 1934 section 2 and the Arbitration Act 1950 section 3 had provisions regarding arbitration and bankruptcy.

<sup>34</sup> Section 349A Arbitration agreements to which bankrupt is party (1) This section applies where a bankrupt had become party to a contract containing an arbitration agreement before the commencement of his bankruptcy. (2) If the trustee in bankruptcy adopts the contract, the arbitration agreement is enforceable by or against the trustee in relation to matters arising from or connected with the contract. (3) If the trustee in bankruptcy does not adopt the contract and a matter to which the arbitration agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings – (a) the trustee with the consent of the creditors’ committee, or (b) any other party to the agreement, may apply to the court which may, if it thinks fit in all the circumstances of the case, order that the matter be referred to arbitration in accordance with the arbitration agreement. (4) In this section – “arbitration agreement” has the same meaning as in Part I of the Arbitration Act 1996; and “the court” means the court which has jurisdiction in the bankruptcy proceedings

<sup>35</sup> Insolvency Act Section 284 and Schedule 5, Part I, 2 and 2a.

Act is “may stay any action.”<sup>36</sup> These are the only statutory provisions for bankruptcy with direct reference to arbitration, but the Insolvency Act covers other procedures of insolvency such as liquidation, administration and administrative receivership.

Liquidation is the procedure involving “the realisation of assets, agreement of creditors’ claims, and distribution of realisations to creditors *pari passu* according to their legal priorities.”<sup>37</sup> During liquidation the company will be shut down; thus, when dissolution has occurred, the arbitration agreement will become null since the company ceased to exist.<sup>38</sup> Liquidation can be made by a voluntary winding-up or a compulsory winding-up. In the first case, the liquidator may participate in arbitral proceedings without permission from the court<sup>39</sup> and in the latter case, the liquidator will need to ask permission to be a party in ongoing or not initiated arbitrations.<sup>40</sup> The Act does not refer to arbitration, but when it says “any action or legal proceedings” it should be understood to include arbitration.<sup>41</sup>

Administration aims at keeping the company alive by restructuring it and administrative receivership is a security enforcement procedure that is normally followed by liquidation.<sup>42</sup> Notwithstanding the administrator having the same power as the liquidator, namely, to represent the company in legal proceedings, the Insolvency Act expressly included the power to refer to arbitration in its authority.<sup>43</sup> Once the company goes into administration, a moratorium on legal process is put in place<sup>44</sup> except if the administrator or the court decides that new claims should

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<sup>36</sup> Insolvency Act Section 285.

<sup>37</sup> George Burn and Elizabeth Grubb, *Insolvency and arbitration in English law*, 8 (4), Int. A.L.R., 124, 129.

<sup>38</sup> Ibid at 127. See also Sutton (n30) 104, Mustill (n10) 153 and *Morris v. Harris* [1927] AC 252.

<sup>39</sup> Insolvency Act 1986, Section 165, 3 and Schedule 4, Part II, 4.

<sup>40</sup> Insolvency Act 1986, Section 167, 1 a and Schedule 4, Part II, 4.

<sup>41</sup> Sir Nicolas Browne-Wilkinson V-C pronounced in *Bristol Airport Plc. and Another v Powdrill and Others* [1990] Ch. 744: “I have no hesitation in rejecting that view. In my judgment the natural meaning of the words ‘no other proceedings ... may be commenced or continued’ is that the proceedings in question are either legal proceedings or quasi-legal proceedings such as arbitration.”

<sup>42</sup> Burn(n37) 125-126.

<sup>43</sup> Schedule 1, 6.

<sup>44</sup> Insolvency Act 1986, Schedule 1b, section 43.

proceed.<sup>45</sup> Therefore, it is up to the court or the administrator to agree with arbitral proceedings started after the company goes into administration.

The statutory provisions present a friendly environment to arbitration but when the issue was debated in court, another route was taken. In *Syska v. Vivendi*<sup>46</sup> a dispute because during the arbitral procedure, Elektrim SA went into insolvency and according to the Polish Bankruptcy and Reorganisation Law, article 142, insolvency makes arbitration clauses ineffective.<sup>47</sup> The arbitral tribunal issued a partial award rejecting the challenge on its jurisdiction based on Polish law. Elektrim's insolvency administrator requested a stay of the proceedings. When deciding, the Court of Appeal had to apply the EC Regulation 1346/2000 on Insolvency Procedures which is the law in England to decide if Polish law would prevail over English law. Two provisions of the regulation, article 4(1)(2)(e) and (f)<sup>48</sup> and article 15<sup>49</sup> were at the centre of the debate since they determine the law applicable to insolvency proceedings within Member States and the effect of insolvency to lawsuits pending. The main question was if the term lawsuit pending would include arbitration, and if so, English law would be applicable. Insolvency in England does not stop arbitration and since lawsuit pending should be understood as including arbitration, there is no reason for an insolvent party not to participate in arbitral procedures. In the *Syska* case the issue of arbitrability was decided by the law of the seat, disregarding the fact that the law of the country to which the insolvent party belongs considered the dispute non-arbitrable. Hence, the Polish public policy was ignored. But Poland is also subject to the same regulation which makes it also its *lex*

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<sup>45</sup> Insolvency Act 1986, Schedule 1b, section 43 2, a and b.

<sup>46</sup> [2009] EWCA Civ 677.

<sup>47</sup> The article states: "Any arbitration clause concluded by the bankrupt shall lose its legal effect as the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued."

<sup>48</sup> "(1) Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings. (2) The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular: ... (e) the effects of insolvency proceedings on current contracts to which the debtor is party; (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending."

<sup>49</sup> "Effects of insolvency proceedings on lawsuits pending the effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending."

*fori*. The interpretation given by English courts in favour of arbitration is reasonable because if the legislators wanted to exclude arbitration from lawsuit pending, they would have said so. However, arbitration has no forum; thus, the counter-argument is valid because lawsuit pending gives the idea of a forum. Be that as it may, the lack of specification should prevail because the characteristics of arbitration are rooted in a court proceeding since both represent access to justice aimed at adjudicating disputes. Even so, the enforcement of an award can be subject to strong challenges to arbitrability, especially if the enforcement is in Poland.

The scenario regarding insolvency and arbitration is peaceful as insolvency claims are not automatically excluding or annulling the arbitration agreement. However, arbitration cannot be employed in every aspect of the insolvency procedure. A decision determining the winding-up of a company has an impact on several parties who did not join an arbitration agreement, being *erga omnes*, a circumstance that is not characteristic of arbitration. In addition, it is common in insolvency procedures for investigations to take place to examine the existence of fraud, which is a public policy matter and cannot be decided by arbitration. Once the mentioned possibilities are no longer the main questions in insolvency, the reasons for disputes to be non-arbitrable fade away.

### **C. Arbitrability and corporate matters**

By nature, corporate issues are purely commercial questions that one could argue it should not be excluded from arbitration. However, the legislation in England and Wales has used wording inclining to the exclusive jurisdiction of courts to solve internal corporate disputes. Any corporation, when it is formed, makes an agreement whereby the rules and regulations of the company are described. These documents, called articles of association, articles of incorporations or bylaws have a contractual nature.<sup>50</sup> As with any contract, an arbitration agreement can be

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<sup>50</sup> See Section 33 Companies Act 2006 and *Cream Holdings Limited v. Stuart Davenport* [2010] EWHC 3096 (Ch).

established to solve disputes arising out of it. Incorporation of arbitration clauses to articles of association can be traced to the 1915 case of *Hickman v. Kent or Romney Marsh Sheepbreeders' Association*.<sup>51</sup> In this case Astbury J. held that a provision in the articles of association for the use of arbitration to settle disputes was an arbitration agreement within the meaning of the Arbitration Act 1889, regardless of the fact that the claimant did not sign the articles of association. The question in this case was about a party joining a company that was already constituted and abiding by the company's regulations to which it did not participate in its elaboration, almost as if the party was concluding an adhesion contract. In that scenario there was no issue of a subject matter being capable of settlement by arbitration, but there was a problem with consent since at the moment a party adheres to the contract, it might be said that it did not consent to the arbitration agreement. However, it is hard to argue that the new shareholder when adhering to the articles of association was unaware of its provisions and did not agree to the arbitration clause.

Moving away from the question of consent and examining the exclusive jurisdiction of courts, it was stated that arbitration in shareholders' disputes should be permitted when related to "enabling/facilitative aspects of company law" and courts should decide when the claim involves "mandatory/prohibitory aspects of company law."<sup>52</sup> The latter refers to "fiduciary duties of directors, derivative actions and disclosure and financial reporting" and the former to "buy-out rights, exit conditions, level of dividend, how voting rights may be exercised" as well as matters that can be subject of a shareholder agreement.<sup>53</sup> The mandatory/prohibitory aspects of company law would be the circumstances covered by Sections 994 and 996 of the Companies Act 2006,<sup>54</sup>

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<sup>51</sup> [1915] 1 Ch 881.

<sup>52</sup> I. Chiu, 'Contextualising shareholder's disputes – a way to reconceptualise minority shareholder remedies' [2006] JBL, 312, 330

<sup>53</sup> Ibid 331.

<sup>54</sup> 994 Petition by company member (1) A member of a company may apply to the court by petition for an order under this Part on the ground – (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. (2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company. (3) In this section, and so far as



namely, a petition to stop a conduct amounting unfair prejudicial to a member or members of the company.

The case law has analysed the conflict between arbitration and an order under Section 994 in *Fulham Football Club (1987) Limited v. Sir David Richards, The Football Association Premier League Limited*.<sup>55</sup> The case concerned a corporate dispute between Fulham Football Club, David Richards and the Premier League. Mr. Richards supposedly acted as a broker on the transaction to transfer Mr. Crouch from Fulham to Tottenham, a situation that was not permitted by the Premier League articles of association. The articles contained a dispute resolution clause. Fulham is a shareholder of the League and decided to bring legal proceedings against the defendants under Section 994 of the Companies Act 2006. The main question was whether the claims under Section 994 were arbitrable since the provision of Sections 994 and 996 mentioned an “application to the court” and “powers of the court.” Moreover, the discussion surrounded the impact of orders under Sections 994 and 996 on third parties who were not parties to the arbitration agreement. Hence, there was a public interest and public policy concern regarding the decision because a court order under Section 994 binds third parties, meaning the situation could not be acceptable through arbitration. The court took the view that there is no restriction to the claims under Sections 994 and 996 to be arbitrated. The fact that the provisions stated that a claim can be brought to courts by itself does not exclude arbitration, otherwise the drafters would have said so. In addition, some of the remedies under Section 996 could not be awarded by arbitrators, but this did not impede the

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applicable for the purposes of this section in the other provisions of this Part, “company” means – (a) a company within the meaning of this Act, or (b) a company that is not such a company but is a statutory water company within the meaning of the Statutory Water Companies Act 1991 ... 996 Powers of the court under this Part (1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of. (2) Without prejudice to the generality of subsection (1), the court’s order may – (a) regulate the conduct of the company’s affairs in the future; (b) require the company – (i) to refrain from doing or continuing an act complained of, or (ii) to do an act that the petitioner has complained it has omitted to do; (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct; (d) require the company not to make any, or any specified, alterations in its articles without the leave of the court; (e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company’s capital accordingly.

<sup>55</sup> [2011] EWCA Civ 855.

solution by arbitration for other issues listed there. The aim of the suit was to seek some compensation for a breach of duty performed by Mr. Richards, which could be decided by arbitrators.

The rationale behind the argument against arbitrability was that some of the orders of Section 996 would affect third parties and, therefore, there would be a public policy concern because creditors who did not have a chance to participate in the arbitration would be distressed by the decision. Nonetheless, reading Section 996, as the court pointed out, it can be concluded that “orders for the regulation of the company’s affairs or restraints upon its power to make alterations in its articles”<sup>56</sup> would be non-arbitrable, but the relief sought was different. The fact that the legislation determined the exclusive jurisdiction of the court was not interpreted to be absolute; what was scrutinized was the public policy aspect of the reliefs granted under the law and if they concerned a public interest that should be protected at all cost. Clearly, some of the hypothesis of Section 996 has no ramifications for third parties and there is no rule in which they could not be arbitrated.

As it can be seen in this case, the absence of provisions in the AA did not stop other instruments from establishing limits to arbitration. Thus, the English system has statutory provisions using a wording like “courts will decide” or “courts will order” such as Section 996 of the Companies Act does. By “court,” the first interpretation should not be exclusive jurisdiction of courts without any possibility of arbitration. This is because some provisions have archaic rationales and perhaps this exclusive jurisdiction regards matters that became non-arbitrable for no particular reason. They can be issues that have no public policy implication and are not mandatory rules of law, being purely commercial with no effect on public law, leading to the

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<sup>56</sup> Ibid paragraph 61.

conclusion that they should be able to be subject to arbitration. The arbitrability of a corporate dispute, at first sight, should not be a matter which cannot be settled by arbitration. The influence of public interest is small and will mostly be connected to the termination of the company when there is a public policy concern regarding the creditors and the commitment of fraud. The topics mentioned here are more questions relating to the validity of the arbitration agreement and how it can bind parties, rather than subjects of discussion falling within the exclusive jurisdiction of courts. In the end, disallowing arbitration in corporate disputes when there is no public policy concern is unfit to the idea of party autonomy. Hypothetically, exclusive court jurisdiction could be understandable if a shareholder is excluded from the company based on racist behaviour by the majority shareholders. Here, there might be a public policy concern since racism can be a criminal offense. Nonetheless, any compensation generated by such conduct could be resolved by arbitration. Once the crime is registered and the authorities proceed to the investigation, any compensation or reintroduction of the shareholder to the company can be decided by arbitrators. As a result, even when an example involves public policy, non-arbitrability of corporate disputes would be applicable in rare cases.

#### **D. Arbitrability and competition law**

In theory, the arbitrability of competition law issues should not be a matter capable of settlement by arbitration since it involves public interest and public policy. The obligation of guaranteeing fair competition relies on the government and only it can stop offenses such as the formation of a cartel. A private tribunal cannot force a company to be divided; only the State can do so. If this was not the case, there would be a transfer of powers that are fundamental principles of any nation to the private sector, allowing it to substitute the judiciary in its entirety. This is not the purpose of arbitration. For this reason, the traditional issues that fall under the exclusive

jurisdiction of courts should not be capable of settlement by arbitration due to their public policy nature or their essential character being bound to the basic function of the State. However, this is not the case and several court decisions have accepted the fact that competition law issues can be decided by arbitrators.<sup>57</sup> It is true that competition law encompasses situations concerning society as a whole, having implications with *erga omnes* effects, giving courts exclusive jurisdiction to decide its quarrels. Still, this does not mean that other ramifications of competition law cannot be decided by arbitrators.

Within the EU, the Court of Justice of the European Union in *Eco Swiss China Time Ltd v. Benetton International NV*<sup>58</sup> addressed the issue in respect of EU competition law being mandatory or not. A challenge to an award was made at Dutch Courts arguing that the decision was against public policy by virtue of article 81 of the European Convention.<sup>59</sup> The case was referred to the Court of Justice of the European Union with questions concerning the interpretation of Article 81. The European Court ruled that an application for annulment of an arbitration award should be granted by a national court if it considers that the award is violating the mandatory rule of Article 81. What the court said is that the challenge can be brought up to court, but it is not necessarily an automatic offense to public policy, even though it is a community mandatory rule. In other words, under the EU, issues concerning competition rules are arbitrable and they can be reanalysed by courts if there is a challenge, but they are not to be considered, *ab initio*, contrary to public policy.

In England, one case has touched upon the subject, but was not truly analytical, so that it could be said that there is no concern in arbitrating competition law claims. In *Et Plus SA v. Welter*<sup>60</sup> a dispute arose regarding a contract to market and sell tickets to freight clients in both

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<sup>57</sup> See *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc.* 473 U.S. 614 (1985) and *Societe Labinal v. Societies Mors et Westland Aerospace* [1993] 4, *Revue de L'Arbitrage*, 645, Cour D'Appel de Paris, May 19, 1993

<sup>58</sup> [2000] 5 C.M.L.R. 816.

<sup>59</sup> Today, Article 101 of the TFEU

<sup>60</sup> [2005] EWHC 2115 (Comm).

Eastern and Western European countries for the use of the Eurotunnel truck shuttle service. The claimant was a group of companies incorporated respectively in Luxembourg, England and Wales, the Netherlands, France and Spain, that marketed and sold tickets. They had a contract for exclusive distributorship with two defendants, The Channel Tunnel Group Ltd. and France Manche SA which together form Eurotunnel. Five of the defendants were formerly directors of or employed by one or another company belonging to the claimant, and once their employment contract was terminated, they were all subsequently recruited by Eurotunnel. In 2004, Eurotunnel gave notice that the contract with the claimant would not be renewed, but before that it sent a letter to the claimant's customers informing the changes and trying to take them as clients. The claimant became aware that, in the meantime, some information obtained from its database regarding its customers was disclosed to Eurotunnel, and took legal action for that reason. The contract had an arbitration clause, and a stay of proceedings taking place in Paris was claimed with one of the several arguments being the violation of Articles 81 and 82 of the EC treaty. The ruling merely said that the disputes were arbitrable and it did not analyse the question since it was not a paramount issue in the case. Justice Gross stated that "[t]here is no realistic doubt that such 'competition' or 'anti-trust' claims are arbitrable; the issue is whether they come within the scope of the arbitration clause, as a matter of its true construction."<sup>61</sup> The decision understood that tortious claims originating from a breach of competition law were covered by the arbitration agreement and it was a cause of action susceptible to arbitration.<sup>62</sup> Although the decision might not be a strong precedent for arbitrability of competition law, the approach is evidence of a solid position towards a permissible view on the arbitrability of issues related to competition law.

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<sup>61</sup> Ibid paragraph 51.

<sup>62</sup> Ibid paragraph 41.

Moreover, for the period in which the United Kingdom is still part of the European Union, Eco Swiss is a strong precedent.

## **E. Arbitrability and gambling**

The arbitrability of gambling contracts goes to the root of public policy since wagering is governed under severe scrutiny. In England and Wales, gambling is legal, but gambling debts were not enforceable until 2005.<sup>63</sup> Before that, the valid statute was the Gaming Act 1845 in which Section 18 declared that gaming contracts or agreements were null and void<sup>64</sup> and, therefore, could not be enforced in courts. This was the case in *O'Callaghan v. Coral Racing Ltd*<sup>65</sup> where Mr. O'Callaghan made a bet on the final scores of four football matches in the defendant's shop. He got all the results right, but when the bet was made the employee at the shop was supposed to have taken a picture of the betting ticket. The rules for gambling with Coral were displayed at their shop and clause 21 specified for arbitration in case of a dispute. Since Coral refused to pay the winnings, an arbitral procedure commenced and a decision was made in favour of the betting company. The gambler resorted to court in order to have the decision remitted to the arbitrator and left to appeal.<sup>66</sup> In courts, the decision dismissed the appeal and concluded that according to Section 18 of the Gaming Act 1845 the arbitration clause was void because the main contract was illegal. The interesting point of this case, even though it does not talk about arbitrability, is that the court not only said that such a contract could not be submitted to arbitration, but also the dispute could not be decided in court. Hirst LJ understood that the statutory provision imposed that the arbitration

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<sup>63</sup> Section 335 of the Gambling Act 2005 states: "Enforceability of gambling contracts (1) The fact that a contract relates to gambling shall not prevent its enforcement. (2) Subsection (1) is without prejudice to any rule of law preventing the enforcement of a contract on the grounds of unlawfulness (other than a rule relating specifically to gambling).".

<sup>64</sup> 18 wagers not recoverable at Law. All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.

<sup>65</sup> [1998] WL 1044030.

<sup>66</sup> The applicable law to the case was not the AA but the Arbitration Act 1950, S 22(1) and the Arbitration Act 1979 Section 1(3)(b).

agreement could not be treated as a separate contract and “as an integral part of the terms on which alone Coral was willing to do business with the appellant,” thus, it was also void. May LJ went further and said that the court could only pronounce that the transaction was not in law a contract; therefore, it had no legal effect. The *O’Callaghan* decision would not be a good case law today because the current law allows the enforceability of gambling debts.<sup>67</sup> Nevertheless, what the Court of Appeal did was to see that the arbitrability of gambling debts at that time was not a subject matter capable of settlement by courts, let alone by arbitration.

## **F. Arbitrability and labour disputes**

Labour disputes are normally guided by a protectionist principle because, quite often, on one side you will have an employer with proper infrastructure to support lengthy and expensive litigation and, on the other side, there is an individual who is not in the same circumstance, creating unequal footing in the dispute. For this reason, labour rights benefit from special protections, making arbitration unattractive. Be that as it may, arbitration of labour disputes is permitted in England, save some reservations. The Employment Protection Act 1975 created the Advisory, Conciliation and Arbitration Service (ACAS) which has “the general duty of promoting the improvement of industrial relations, and in particular of encouraging the extension of collective bargaining and the development and, where necessary, reform of collective bargaining machinery.”<sup>68</sup> Section 3<sup>69</sup> provided for the possibility of arbitration as a dispute resolution method for collective rights. The Employment Protection Act 1975 was repealed by the Trade Union Labour Relations (Consolidation) Act 1992. Nonetheless, the new legislation kept ACAS in

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<sup>67</sup> (n63)

<sup>68</sup> Section 1 (2).

<sup>69</sup> Section 3 – Where a trade dispute exists or is apprehended the Service may, at the request of one or more parties to the dispute and with the consent of all the parties to the dispute, refer all or any of the matters to which the dispute relates for settlement to the arbitration of – (a) one or more persons appointed by the Service for that purpose (not being an officer or servant of the Service); or (b) the Central Arbitration Committee constituted under PART I section 10 below.

Section 209 where it stated that “[i]t is the general duty of ACAS to promote the improvement of industrial relations” and Section 212 dealt with arbitration in similar terms to the previous Act.<sup>70</sup> Moreover, some individual rights can be submitted to arbitration as Section 212A, inserted by the Employment Rights (Dispute Resolution) Act 1998, and the Employment Act 2002 allows arbitration for disputes concerning unfair dismissal and flexible working.<sup>71</sup>

Accordingly, collective disputes can be arbitrated, but some individual subjects such as discrimination based on sex and or pregnancy in the working environment cannot. This was the case of *Clyde & Co v. Bates van Winkelhof*<sup>72</sup> in which a solicitor was expelled from a law firm and the contract establishing her as a partner of the firm had a dispute resolution clause.<sup>73</sup> After being removed from the membership with the firm, she started proceedings in the Employment Tribunal claiming that she had been discriminated against by the claimants on the basis of sex and or pregnancy and that she had been subjected to a number of detriments, including being expelled

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<sup>70</sup> Section 12 Arbitration. (1) Where a trade dispute exists or is apprehended ACAS may, at the request of one or more of the parties to the dispute and with the consent of all the parties to the dispute, refer all or any of the matters to which the dispute relates for settlement to the arbitration of – (a) one or more persons appointed by ACAS for that purpose (not being officers or employees of ACAS), or (b) the Central Arbitration Committee. (2) In exercising its functions under this section ACAS shall consider the likelihood of the dispute being settled by conciliation. (3) Where there exist appropriate agreed procedures for negotiation or the settlement of disputes, ACAS shall not refer a matter for settlement to arbitration under this section unless – (a) those procedures have been used and have failed to result in a settlement, or (b) there is, in ACAS’s opinion, a special reason which justifies arbitration under this section as an alternative to those procedures. (4) Where a matter is referred to arbitration under subsection (1)(a) – (a) if more than one arbitrator or arbiter is appointed, ACAS shall appoint one of them to act as chairman; and (b) the award may be published if ACAS so decides and all the parties consent.

<sup>71</sup> 212A Arbitration scheme for unfair dismissal cases etc. (1) ACAS may prepare a scheme providing for arbitration in the case of disputes involving proceedings, or claims which could be the subject of proceedings, before an employment tribunal under, or arising out of a contravention or alleged contravention of – section 80G(1) or 80H(1)(b) of the Employment Rights Act 1996 (flexible working) (a) Part X of that Act (unfair dismissal), or (b) any enactment specified in an order made by the Secretary of State.

<sup>72</sup> [2011] EWHC 668 (QB).

<sup>73</sup> The members agreement stated: “41.1 If at any time there is a dispute, difference or question that shall arise between the Members or between the LLP and the Members (including any Outgoing Member or his personal representatives), or any of them, touching the membership of the LLP ... or the rights and liabilities of the Members ... (together ‘Referred Matters’), then the Member or Members involved in such dispute, difference or question (‘parties’) shall deal with it as provided in this clause and clause 41.2 below. The matter shall be immediately referred by any of the parties to the Management Board requiring it to meet and to make a decision on the relevant matter within 28 days of the matter being so referred to the Management Board (‘Decision Period’). The Management Board shall meet and discuss the relevant matter with a view to resolving the issue in a sensible and fair manner. If the Management Board reaches agreement with the parties within the Decision Period the Members agree that such agreement be promptly implemented. If the Management Board fails to agree on any matter within the Decision Period or if the dispute is with the Management Board itself then clause 41.2 below shall apply. 41.2 If a dispute still remains after the application of 41.1 above, including any question regarding the Referred Matters or the application of this dispute resolution procedure, then the parties agree first to refer the matter to the Centre for Dispute Resolution (CEDR) in an attempt to settle the dispute in good faith by Alternative Dispute Resolution (ADR). If the dispute is not settled within 30 days of the request to CEDR by one of the parties, or such further period as the parties shall agree in writing, either party may require that the dispute be referred to and finally resolved under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause 41.2, save that the parties preserve the right to appeal or to refer to the English Courts on questions of law which shall have jurisdiction in such circumstances. The Members and the LLP reserve all their respective rights in the event that no agreed resolution shall be reached in the ADR procedure and none of them shall be deemed to be precluded from taking such interim formal steps as may be considered necessary to protect such person’s position while the ADR procedure is pending.”



from the firm because she had made a number of protected disclosures within the meaning of Section 43A of the Employment Rights Act 1996.<sup>74</sup> When faced with the claim in the Employment Tribunal, the claimants sought, in court, an order for the respondent to apply for a stay in the Employment Tribunal or consent for the application to be done by the claimants so arbitration could take place. The claim was based on three provisions of the Equality Act 2010: the first was the prohibition of discrimination regarding gender and pregnancy in the working environment;<sup>75</sup> the second was the fact that the Employment Tribunal has jurisdiction to decide disputes related to the subjects mentioned,<sup>76</sup> except if they originate from the armed forces; and third, a term of contract that excluded or limited the provisions of the Act is unenforceable.<sup>77</sup> The Act makes an exception allowing arbitration if the dispute is under a scheme set by the Trade Union and Labour Relations (Consolidation) Act 1992.<sup>78</sup> Moreover, the Employment Rights Act 1996 has analogous provisions determining that any agreement to limit the operation of the Act and preclude someone from taking legal action under the Act before an employment tribunal is void.<sup>79</sup> It also has sections using the same wording of the Equality Act 2010 concerning arbitration.<sup>80</sup> The case focused on the fact that according to labour regulation, the arbitration clause was void since it would not allow the defendant to pursue a claim in the Employment Tribunal. The idea was that claims of sex discrimination, pregnancy discrimination and protected disclosures cannot be precluded from the

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<sup>74</sup> 43A Meaning of “protected disclosure.” In this Act a “protected disclosure” means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

<sup>75</sup> See sections 64 to 76.

<sup>76</sup> 120 Jurisdiction (1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to – (a) a contravention of Part 5 (work).

<sup>77</sup> 144 Contracting out (1) A term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act.

<sup>78</sup> 144 Contracting out ... (4) This section does not apply to a contract which settles a complaint within section 120 if the contract – (a) is made with the assistance of a conciliation officer, or (b) is a qualifying compromise contract ... (6) A contract within subsection (4) includes an agreement by the parties to a dispute to submit the dispute to arbitration if – (a) the dispute is covered by a scheme having effect by virtue of an order under section 212A of the Trade Union and Labour Relations (Consolidation) Act 1992, and (b) the agreement is to submit the dispute to arbitration in accordance with the scheme.

<sup>79</sup> 203 Restrictions on contracting out. (1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports – (a) to exclude or limit the operation of any provision of this Act, or (b) to preclude a person from bringing any proceedings under this Act before an employment tribunal.

<sup>80</sup> See Section 203(5).

Employment Tribunal, which has exclusive jurisdiction. Therefore, the court did not grant the claimant's request for the defendant to stay the procedures in the Employment Tribunal or consent for the application to be done by the claimants so arbitration could take place.

The overall view is that labour disputes are not entirely arbitrable and even though there is no specific rule excluding labour rights from arbitration, the reservations are evident. Some regulations are clear, such as unfair dismissal and flexible work. However, when it comes to discrimination – which is a matter of public policy – court's jurisdiction was protected. Such safeguard is intriguing because the result of a violation based on discrimination would be compensation, which is not, in itself, a question of public policy; thus, why should it be decided in court? Discrimination as a criminal offense has no place in an arbitral tribunal, but that is not the case here. The protectionist principle in labour law can and must be employed in any type of dispute concerning labour rights, either in court or in arbitration. Moreover, there is no impediment to the employment of this principle by the arbitrators, hence, arbitration per se is not incompatible with labour conflicts.

## **G. Arbitrability and consumer contracts**

As in labour disputes, consumer disputes face the same circumstances of disparity between the parties. On the one side there is a consumer, the weaker party, and on the other side are traders, the stronger party. For that reason, consumer regulations have a public policy nature since they try to break down the inequality between the consumer and traders, creating a mechanism protecting the consumers against hostile practices. Arbitration of consumer disputes could be seen as a draconian approach, particularly if the agreement to arbitrate can be found in the form of an adhesion contract of which the consumer would not be aware. Moreover, the adhesion contract would be forced onto the consumer excluding his autonomy and acting as a “take it or leave it”

transaction. Even though this might be the scenario, it does not mean that consumer disputes should be non-arbitrable.

Sections 89 to 91 of the AA states that the Unfair Terms in Consumer Contract Regulations 1994 are extended to a term which is considered an arbitration agreement and that if a modest amount is sought, the arbitration agreement is unfair. The Unfair Arbitration Agreements (Specified Amount) order 1999 established that the sum of £5,000 is the threshold for the modest amount. Therefore, if a contract is worth less than £5,000 and is considered a consumer contract, an existing arbitration agreement in this contract will be considered unfair and will not be binding to the consumer, leading to the non-arbitrability of the dispute. However, if the contract value is superior to £5,000 the arbitration agreement is, in theory, not unfair.

The case law assessing different circumstances concluded that the £5,000 threshold cannot be examined alone. Actually, in consumer cases what is important is if the party is a consumer and if he or she is informed of the arbitration clause. In *Heifer International Inc. v. Christiansen*<sup>81</sup> a contract for refurbishment of a house set at £1,000,000 was concluded by the claimant, an off-shore company belonging to the person who was going to live in the house with his family, and the defendant was an architect firm from Denmark. There were failures in the performance of the contract and the claimant decided to sue in court which led to the defendant's challenging the court jurisdiction and requesting a stay based on the existence of an arbitration agreement in the contract. The claimant argued that it was a consumer and for that reason it would fall into the category of unfair terms according to Section 8(1) of the Unfair Terms in Consumer Contracts Regulation 1999,<sup>82</sup> leading to an unfair declaration of the arbitration agreement. The court reached the conclusion that the claimant was a consumer and asserted that "[a] company which obtains goods

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<sup>81</sup> [2007] EWHC 3015 (TCC).

<sup>82</sup> Effect of unfair term 8 – (1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

and services for purposes outside its trade, business or profession is therefore within the terms of these Regulations.”<sup>83</sup> This was determined because the off-shore company was made in order to avoid taxation and it was not an active company. In addition, the purpose of buying the house and refurbishing it was not an investment opportunity, but a place for Heifer’s shareholder to live, a situation that would not exclude its consumer qualification. Nonetheless, despite the claimant being a consumer the arbitration agreement was not found unfair. The court showed that the regulation would consider arbitration clauses unfair when it quoted Section 3(1),<sup>84</sup> Section 5<sup>85</sup> and Schedule 2(1)(q).<sup>86</sup> Even so, when analysing the facts it realized that there was a long negotiation between the parties, assisted by lawyers, and also without imposition of terms. Applying the test of Section 5(2) and 6(1),<sup>87</sup> it decided that the arbitration was not unfair due to the fact that the environment in which the negotiation took place was never an unfair situation for the consumer. The interesting aspect of this case is that the court did not follow the provisions of Schedule 2 and understood that the terms were not unfair. After all, when Section 5(5) refers to Schedule 2 it does not make a mandatory rule as it says that they “may be regarded as unfair.” Even though the case did not focus on the Unfair Arbitration Agreements (Specified Amount) order 1999, the court saw no reason why there was an imbalance between the parties or that the contract was not negotiated in good faith. If the purpose of protecting a consumer is based on the idea that they are not in the

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<sup>83</sup> See supra note 102, para 226.

<sup>84</sup> 3. – (1) In these Regulations ... “consumer” means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession.

<sup>85</sup> 5. – (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. (2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term. (3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract. (4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

(5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

<sup>86</sup> 1. Terms which have the object or effect of ... (q) excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

<sup>87</sup> 6. – (1) Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

same position as the person they are contracting with, this could not apply to this case. It was an off-shore company that had legal assistance during the whole contract negotiation. If such consultancy was not adequate, they would have a potential case against the lawyer but not against the defendant. Furthermore, it could be argued, if someone has £1,000,000 to refurbish a house, this person is not in an inferior position that requires such protection.

Another view was taken in a construction contract in *Mylcrist Builders Limited v. Mrs. G Buck*.<sup>88</sup> This time, the consumer did not participate in the negotiation of the contract and refused to participate in the arbitral procedure. The court first decided that the unfair arbitration agreement did not fall into the category established in Section 91 of the AA and it moved on to analyse the agreement through the lens of the Unfair Terms in Consumer Contracts Regulation 1999. It found that the contract to arbitrate was not transparent, contrary to good faith and caused a great imbalance in the parties' rights and obligations. Ramsey J stated that "[w]hilst the sum at stake in this case does not lead to the automatic unfairness imposed by ss. 89 to 91 of the 1996 Act, there is a further element of imbalance to the detriment of the consumer where the claims are small and where the fees payable to the arbitrator are comparatively significant."<sup>89</sup> The fee was of over £2,000 which characterizes unfairness because the original claim was of £5,230.21, plus £4,366.29 for costs, a situation detrimental to the consumer who was a lay person who did not understand what the arbitration agreement was when she signed the contract. The application of the EU consumer law can be raised even if it was "waived" during the arbitral procedure. In *Mostaza Claro v. Centro Milenium Móvil SL*<sup>90</sup> a dispute arose out of contract for mobile services containing an arbitration clause. The arbitral procedure commenced by the trader and it resulted in an award

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<sup>88</sup> [2008] EWHC 2172 (TCC).

<sup>89</sup> Ibid paragraph 55.

<sup>90</sup> [2007] Bus. L.R. 60

against the consumer. During arbitration, there was no challenge to the validity of the arbitration agreement because it was unfair, however, when challenged in the Spanish Courts, the claim was that the agreement to arbitrate was unfair. The Spanish Court found that the arbitration clause, according to EU law was null but since the issue had not been raised during the arbitral procedure, it referred the case to the Court of Justice of the European Union to clarify if EU consumer law would apply even if the consumer only raised it in court. It was ruled that national courts could apply the EU consumer law in cases of annulments of arbitral awards even if the issue raised during annulment proceedings were not dealt with during the arbitral proceedings.

The two English cases reveal that the arbitrability of consumer disputes is undeniable. The statutory provision establishing the £5,000 value for modest claims creates a first step to be examined and once it is surpassed, the scrutiny will focus on the fairness of the clause. Even if the party is a consumer does not mean that the arbitration agreement is automatically unfair. The rationale in *Heifer* is quite reasonable considering the contract value and the consumer. A consumer that is an off-shore company is by no means an uninformed consumer and a contract worth £1,000,000 cannot be an agreement between parties who are not aware of arbitration. The idea is not to stop consumer arbitration; on the contrary, it is to allow it depending on who is contracting.

The threshold of £5,000 perhaps does not make much sense because if the value of the transaction is of £5,001, imposing arbitration could still be an economic burden to the consumer. Nevertheless, the case law demonstrates that once the contract is superior to £5,000, the rule in the AA is not applicable and the scrutiny is based on the fairness of the clause and if it is equitable. On the one hand, if the consumer is a wealthy person, as in *Heifer*, this person cannot argue that he or she was not familiar with arbitration, particularly if he or she is acting as a consumer through

an off-shore company on a £1,000,000 contract. On the other hand, if the consumer is a layperson living on a £3,000 per month salary and has saved £10,000 over six years to purchase a product, imposing arbitration might not seem fair. It is a fact that consumer regulation is embodied in public policy principles aimed at protecting the consumer against abuses; however, the consumer still enjoys freedom of contract and party autonomy. There is no removal of the public policy aspects from consumer laws by arbitration because arbitral tribunals can only decide if there is a violation of a consumer right or not, it cannot implement consumer policy. Therefore, the arbitrability of consumer disputes is rooted in a matter incapable of settlement by arbitration based on a need to protect the consumer in certain cases. However, if what is being sought is a relief originated by a violation of a consumer protection rule, the consumer should have the power to decide if he or she wants the dispute to be arbitrated. This view of non-arbitrability can derive from the idea that the question in itself, can be arbitrated and since it causes a detriment to access to justice, becomes non-arbitrable. Consumer policy is a public policy concern, but the relief sought by a violation of consumer law is not essentially a matter of public policy. In this case, the legislation will try to create an obstacle such as Sections 89 to 91 of the AA. However, the issue is not if the subject forms part of a core principle of the State's function, but a preservation of a balance in litigation, which is a role that democratic nations have in assuring due process of law.

Furthermore, the recently enacted Consumer Rights Act 2015 did not consider that a term to submit disputes to arbitration in consumer contracts is to be seen as a form of excluding or restricting any liability. It employs a provision with the same wording when addressing the "liability that cannot be excluded or restricted" under the following headings: "[c]an a trader contract out of statutory rights and remedies under a goods contract?", "[c]ompensation for damage to device or to other digital content" and "[c]an a trader contract out of statutory rights

and remedies under a services contract?”<sup>91</sup> Nevertheless, the Consumer Rights Act 2015 on Schedule 2 has a list of terms that might be regarded as unfair and on number 20 it states that “[a] term which has the object or effect of excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, in particular by – (a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions (...)”. The text has to be interpreted in conjunction with the AA, the Unfair Arbitration Agreements (Specified Amount) order 1999 and the case law, following the rationale presented above as arbitration clauses in consumer contracts do not automatically make the dispute non-arbitrable.<sup>92</sup>

## Conclusion

In the AA, the method to assess arbitrability is not entirely easy to detect. Although there is no specific provision in the AA regarding arbitrability, this does not necessarily mean that arbitration is limitless. It is understandable that a limitation to arbitrability is necessary. After all, a country should preserve its jurisdiction to sustain its judiciary and its sovereignty. Be that as it may, exaggerated protectionism does not work either and it is imperative to find a balance or a common ground on how far arbitration should reach.

By reviewing the case law concerning specific topics of arbitrability in English law the scenario seems to be relatively stable. Despite the apparent silence in the AA regarding the subject, other statutes can provide guidance on how courts should decide if the dispute is arbitrable, for instance, when a statutory provision uses a wording saying that “courts will decide” or “courts will

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<sup>91</sup> Sections 31(4), 47(4) and 57(6) of the Consumer Rights Act 2015 has the following wording: “[a]n agreement in writing to submit present or future differences to arbitration is not to be regarded as excluding or restricting any liability for the purposes of this section.”

<sup>92</sup> This view is also presented in the Consumer Rights Act 2015 Explanatory Notes as paragraphs 163, 226 and 282, referring respectively to Sections 31, 47 and 57, contain the following explanation: “This section also provides that an agreement to submit disputes to arbitration is not covered by this bar on excluding or restricting liability. It should be noted however that paragraph 20 of Schedule 2 makes clear that a term requiring the consumer to take disputes exclusively to arbitration may be regarded as unfair. Furthermore, the Arbitration Act 1996 provides that a term which constitutes an arbitration agreement is automatically unfair (under Part 2 of the Act, once it comes into force), if the claim is for less than an amount specified in an Order made under section 91 of the Arbitration Act. This amount is currently set at £5000 in the Unfair Arbitration Agreements (Specified Amount) Order 1999 (SI 1999/2167)”. It is possible that this amount may change from time to time. *In* <http://www.legislation.gov.uk/ukpga/2015/15/notes/division/3/1/5/1?view=plain>, accessed on 18.04.2015.



order” as it is done by Section 996 of the Companies Act. Analogous contexts can be found in the areas of consumer law, gambling law and employment law. Unfortunately, such view is not entirely accurate. It can be argued that the AA, in itself, would not benefit from a definition of arbitrability as this topic should be addressed by courts. Hence, there is a need for courts to clarify the limits to arbitrability.

The reasoning in *Dallah* used the USA’s understanding of arbitrability as being mainly a jurisdictional issue. Arbitrability is more than a jurisdictional issue. Although it might be challenged as a lack of the arbitral tribunal’s jurisdiction, it goes beyond the agreement to arbitrate as it touches the subject matter of the dispute. Perhaps, English courts could clarify the *dictum* in *Dallah* and explain that despite the AA allowing arbitrability to be challenged through arguments regarding the tribunal’s jurisdiction, it is not simply a matter of jurisdiction but also the subject matter of the dispute.